Supreme Court, U.S.
FILED
MAR 1 1993
OFFICE OF THE CLERK

No. 92-1300

In The

Supreme Court of the United States

October Term, 1992

ROY J. KENDALL, *et al.*,

Petitioners,

v.

THE CITY OF VISALIA, *et al.*,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the California trial court's imposition of sanctions against an attorney pursuant to California Code of Civil Procedure Section 128.5 in a lawsuit involving a challenge to local governmental actions violates the client's rights to petition the government for redress of grievances under the First Amendment to the United States Constitution?

2. Whether Petitioners may raise issues in their petition for writ of certiorari that were not raised in the courts below and are not issues arising from this action?

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RESPONDENTS' BRIEF IN OPPOSITION

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Respondents respectfully request this Court deny Petitioners' petition for a writ of certiorari to review the decision of the California Court of Appeal, Fifth District.

OPINIONS BELOW

The decision of the California Court of Appeal, Fifth Appellate District, was rendered on May 19, 1992, and is not reported. The opinion affirms the judgment of the Superior Court of Tulare County, California, Case No. 139050, filed March 8, 1991, an unreported judgment. Petitioners' request for discretionary review by the California Supreme Court was denied on August 12, 1992.

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JURISDICTION

The jurisdiction of this Court is pursuant to 28 U.S.C. § 1257(3).

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

peaceably to assemble, and to petition the Government for a redress of grievances.

California Code of Civil Procedure Section 128.5 provides in relevant part:

Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

California Government Code Section 53511 provides in relevant part:

A local agency may bring an action to determine the validity of its bonds, warrants, contracts, obligations or evidences of indebtedness pursuant to Chapter 9 (commencing with Section 860) of . . . the Code of Civil Procedure.

California Code of Civil Procedure Sections 860 and 863 provides in relevant part:

A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this chapter, and for 60 days thereafter, bring an

action in the superior court of the county in which the principal office of the public agency is located to determine the validity of such matter.

. . .

If no proceedings have been brought by the public agency pursuant to this chapter, any interested person may bring an action within the time and in the court specified by Section 860 to determine the validity of such matter.

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STATEMENT OF THE CASE

Petitioners have made it their hobby to sue Respondents over the project which is the subject of this Petition. This action is one of five lawsuits Petitioner Kendall has instituted regarding the hotel project in downtown Visalia, California, which Petitioners philosophically oppose.

This Petition arises from the Tulare County Superior Court's dismissal of an action filed against Respondents City of Visalia ("City"), the Redevelopment Agency of the City of Visalia ("Agency"), the Visalia Public Building Authority, and various City officials after the court sustained Respondents' demurrer to

Petitioner's third amended complaint without leave to amend, and the imposition of sanctions in the amount of $7,500 against counsel Leonard C. Hoar, Jr. (Appendix to Petition for Writ of Certiorari ["Appendix"], pp. 51-61.) That complaint constituted Petitioner Kendall's *fourth* attempt to plead a cause of action challenging the validity of a lease between the City and Visalia Convention Center Hotel, Inc. ("VCCH"), a guarantee agreement entered into by the Agency and Metro North State Bank ("Bank"), and the actions by various City and Agency elected officials and appointed officers related to the lease and guarantee agreement.

On February 1, 1987, the City and VCCH entered into a lease under which the City agreed to lease certain real property to VCCH which was to construct a hotel thereon. The hotel was to be built immediately adjacent to a proposed expansion of the existing Visalia Convention Center which is operated by the City. (Appendix, pp. 6-7.)

On July 27, 1988, the City Council approved a "First Amended Agreement to Lease." Among the principal changes made in the First Amended Agreement to Lease was a provision

that the City, in order to assist VCCH in securing a construction loan from the Bank, would agree to contribute up to 2.9 million dollars toward VCCH's equity contribution required under the loan if VCCH could not provide all of its equity contribution. In the event that the City made such contributions toward VCCH's equity, VCCH would be obligated to reimburse such advances with interest through additional rental payments under the lease and, in addition, to pay to the City a percentage of the net operating income from the hotel. (*Id.*, pp. 7-8.)

At that same meeting, the City Council, sitting as the governing board of the Agency, approved an agreement with the Bank, providing for a guarantee of the partial repayment of the loan from Bank to VCCH for the construction of the Convention Center Hotel project ("Guarantee Agreement"). (*Id.*)

On July 3, 1989, Petitioner Kendall filed a complaint for declaratory relief, damages and injunction in the United States District Court, Eastern District of California naming as Defendants the City, the Agency and others. That complaint alleged the First Amended Agreement to Lease and the Guarantee

Agreement were in violation of California Constitution, Article XVI, paragraph 6, which prohibits gifts of public funds. The public entities and officials filed a motion to dismiss for lack of a federal question, and, immediately prior to the hearing on said motion, Petitioner Kendall voluntarily dismissed his federal action (Case No. CV-F-89-467 EDP). (*Id.*, p. 9; CT 133:14-15.)[1]

On September 5, 1989, Petitioner Kendall filed his initial complaint in this action. (Appendix, p. 9; CT 188:7-8.) Before service was made, he filed a first amended complaint. (Appendix, p. 9; CT 188:9.) In November, 1989, these Respondents filed a demurrer to the first amended complaint on the ground the challenge to the First Amended Agreement to Lease and the Guarantee Agreement was barred by the 60-day statute of limitations in California Code of Civil Procedure Section 863, and on December 4, 1989, the court sustained the demurrer with leave to amend. (Appendix, p. 10; CT 188:24-

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[1] CT refers to the Clerk's Transcript for the appeal in this action in the California appellate system. The number listed after "CT" is the page number. The numbers following the colon, if any, are line numbers.

26.) The court granted leave to amend if causes of action could be pled that were not barred by the 60-day statute of limitations and which did not turn on the validity of the First Amended Agreement to Lease and the Guarantee Agreement. (CT 237:24 - 238:13.)

Petitioner Kendall then retained Petitioner Hoar as his counsel and filed a second amended complaint. Notwithstanding the court's ruling that the validity of the First Amended Agreement to Lease and Guarantee Agreement could not be challenged, Petitioner Kendall realleged and even expanded his challenge to these agreements. On February 8, 1990, Respondents filed a demurrer and motion to strike the second amended complaint. (Appendix, p. 10; CT 190:1-2.) The demurrer was heard on February 28, 1990. The court concluded that the second amended complaint was confusing as far as theories and statement of the required facts to support those theories. (Appendix, p. 11; CT 498:24-26 and 499:1.) The court allowed Petitioners to further amend the complaint with the admonition that the court was *not* inclined to grant any leave to

amend the complaint further. (CT 499:2-7.) The court granted *60* days to again amend the complaint and "suggested" that Petitioner Hoar try to organize his theories and plead ultimate facts to support those theories. (Appendix, p. 11; CT 499:16-25.) The court repeated its prior ruling that causes of action which go to the validity of the First Amended Agreement to Lease and Guarantee were barred by the 60-day statute of limitations. (CT 500:17-26.)

The court subsequently extended Petitioners' time for filing a third amended complaint for an additional 30 days. (Appendix, p. 11; CT 190:9-12.) Petitioners filed a third amended complaint on May 30, 1990, which mushroomed to 123 pages, and 10 causes of action, and which again, despite the trial court's explicit prior rulings and directions to Petitioner Hoar, purported to challenge the validity of the First Amended Agreement to Lease and the Guarantee Agreement. (Appendix, p. 11.)

On July 13, 1990, these Respondents filed their demurrer and motion to strike said third amended complaint. On August

23, 1990, the demurrer and motion to strike were sustained, *without* leave to amend, as to all causes of action except the seventh cause; as to said cause of action (which appears to be an attempt to state a claim against Respondents under RICO), the demurrer was sustained with 90 days leave to amend. (Appendix, p. 11.) All causes of action challenging the First Amended Agreement to Lease and Guarantee Agreement were once again found to be barred by the 60-day statute of limitations. Numerous additional bases for the ruling were stated. (Appendix, pp. 51-60.) The court also granted Respondents' motion for imposition of sanctions against Petitioner Hoar, personally, in the amount of $7,500. (*Id.*) (CT 722:26 and 723:1-2.) The sanctions were based upon: (1) counsel failed to follow the prior directive of the court to organize legal theories and plead ultimate facts (CT 719:12-16); (2) counsel's including of improper and irrelevant materials in the complaint (CT 720:1-3); (3) counsel's actions in this matter appeared in many cases to have been done frivolously with bad faith and for the purpose of delay (CT 721:24-26); and (4) counsel failed to review his own cases that were cited to the

court and admitted that he took citations from a treatise (*California Jurisprudence*) without reading the cases themselves. (CT 722:2-7.)

Petitioners made numerous attempts to overturn this ruling while the case was still at the superior court level, including filing a motion for reconsideration (CT 523 and 524) and a motion to disqualify the judge. (CT 600 through 621.) Petitioners never filed a fourth amended complaint on the RICO cause of action. Ultimately, on Petitioners' own motion, the trial court entered a judgment of dismissal of the entire case. (CT 1049 and 1050.)

Petitioners' unsuccessful appeal ensued. On May 19, 1992, the Court of Appeal rejected all Petitioners' challenges and affirmed the judgment below. (Appendix, pp. 4-50.) Therein, the court explained in detail the justification for sustaining the demurrer without leave to amend as to each cause of action. (*Id.*, pp. 18-33.) It then set forth in detail the extensive basis for the sanctions against Petitioner Hoar. (*Id.*, pp. 34-50.)

Petitioners unsuccessfully sought review from the California Supreme Court. (*Id.*, p. 1.)

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SUMMARY OF ARGUMENT

Petitioners' first two issues presented--whether a plaintiff has the right under the First Amendment to file a lawsuit challenging governmental action and whether he or she has the right to be represented by counsel--are simply not issues arising from this action. If they were, they would not be disputed by Respondents.

The imposition of sanctions against Petitioner Hoar was justified in this case based upon his conduct, which included disobeying court orders and misrepresenting the holdings of cases. The imposition of sanctions did not violate Petitioners' First Amendment rights. The fact that governmental action is the subject of a lawsuit does not immunize litigants from the monetary consequences of unreasonable or frivolous litigation tactics.

Finally, Petitioners' challenge to the "methodology" used

by the trial court in reaching its decision is not properly at issue. Petitioners never asserted a federal issue on this point in the California court system. If they had, it would have failed since the application of the statute of limitations in this instance would have passed constitutional muster.

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ARGUMENT

I. PETITIONERS' FIRST TWO QUESTIONS PRESENTED ARE NOT AT ISSUE IN THIS ACTION.

As their first two "Questions Presented," Petitioners pose the following:

1. Do plaintiff and his attorney have the right under the First Amendment to petition the government of the City of Visalia for redress of grievances through the filing and prosecution of a lawsuit in order (a) to save Visalia Taxpayers' money, (b) to halt the illegal use and waste of taxpayers' general fund money and property to finance and support the construction of the privately owned Visalia Radisson Hotel, and (3) to recover misspent funds for the City Treasury?

2. Does a plaintiff who petitions the government for redress of grievances through the filing and prosecution of a lawsuit under the First Amendment have the right to have an attorney represent him in that lawsuit?

While these questions must obviously be answered in the affirmative, they are not issues before this Court. Petitioners certainly have taken full advantage of the judicial system as is their right under the First Amendment. Petitioner Kendall has never been deprived of representation by the counsel of his choice. There is certainly a clear distinction between having the *right* to petition for redress, and the denial of the redress sought based upon sound legal principles and well reasoned decisions of the courts. Having the right to petition does not guarantee the party the right to prevail.

II. THE IMPOSITION OF SANCTIONS UPON PETITIONER HOAR DOES NOT VIOLATE PETITIONERS' RIGHTS UNDER THE FIRST AMENDMENT.

The imposition of sanctions on counsel does not violate a party's right to petition the government for redress of grievances. In *Charles v. Daley*, 846 F.2d 1057 (7th Cir. 1988),

cert. denied, 492 U.S. 905, 109 S.Ct. 3214, 106 L.Ed.2d 564 (1989), *rehearing denied*, 492 U.S. 938, 110 S.Ct. 24, 106 L.Ed.2d 626 (1989), the court rejected the argument advanced here. It found that requiring private litigants to pay the plaintiffs over $200,000 did not violate the parties' rights under the First Amendment. It explained:

> While *Button* and *Primus* undeniably stand for the proposition that a right of access to the courts is guaranteed to those who seek to engage in litigation as a form of political expression, neither case suggests that such use of the judicial forum is entitled to be conducted free from both the inherent and statutorily imposed financial consequences of such activity.
>
> Litigation is not purely speech, it is more; litigation is conduct which can and does impose considerable costs on the parties as well as upon the federal judiciary. Where, as here,

> Congress has determined that a particular class of litigants, civil rights plaintiffs, is deserving of a fee-shifting scheme to make them whole after incurring substantial expenses in vindicating their constitutional rights, we refuse to hold such a scheme violative of the First Amendment simply because it forces those who choose voluntarily to interject themselves into such lawsuits to think twice before engaging in battle.

Id. at 1075, *citing NAACP v Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) and *In Re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978).

Federal courts have not hesitated to require private litigants to pay the attorneys' fees of successful public entity defendants in civil rights actions where their lawsuits were frivolous or unreasonable. *See, e.g., Raskiewicz v. Town of New Boston*, 754 F.2d 38 (1st Cir. 1985), *cert. denied*, 474 U.S. 845, 106 S.Ct. 135, 88 L.Ed.2d 111 (1985); *Munson v. Friske*, 754

F.2d 683 (7th Cir. 1985); *Goldrich, Kest & Stern v. City of San Fernando*, 617 F.Supp. 557 (C.D. Cal. 1985).

III. PETITIONERS DID NOT ASSERT ANY FEDERAL CHALLENGE TO CALIFORNIA'S VALIDATION ACT IN THE STATE COURT AND WOULD NOT HAVE PREVAILED IF THEY HAD.

As their final question presented, Petitioners appear to claim that the courts below have decided the case "on methodology" rather than on its merits, again depriving Petitioners of a First Amendment right. Presumably, Petitioners are referring to the application of California's "Validation Act" (Cal. Code Civ. Pro. §§ 860 *et seq.*), including the 60-day statute of limitations which barred their challenge to the First Amended Agreement to Lease and the Guarantee Agreement. Under California law, the First Amended Agreement to Lease and the Guarantee Agreement could only be challenged for 60 days. *Graydon v. Pasadena Redevelopment Agency*, 104 Cal.App.3d 631, 164 Cal.Rptr. 56 (1980), *cert. denied*, 449 U.S. 983, 101 S.Ct. 400, 66 L.Ed.2d 246 (1980); *Walter v. County of Plumas*, 61 Cal.App.3d 460, 132 Cal.Rptr. 174 (1976); Cal. Gov't Code § 53511; Cal. Code Civ. Pro. §§ 860, 863.

No federal challenge has previously been asserted by Petitioners regarding this "methodology." The *only* "federal" challenge raised by Petitioners in the California courts was limited to the imposition of sanctions against Petitioner Hoar. (Appendix, pp. 78-93.)

It is fundamental that since no federal questions were "drawn in question" regarding this methodology as required by 28 U.S.C. § 1257, this Court has no jurisdiction to address the issue at this juncture. *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969).

Even setting this failure aside, Petitioners simply have not identified how the reasonable procedural rulings of the California courts violated any First Amendment right.

The California Legislature adopted the validation procedures, including the 60-day statute of limitation, to provide a simple, uniform, *in rem* method for testing the validity of certain actions of public agencies regarding redevelopment. *Green v. Community Redevelopment Agency*, 96 Cal.App.3d 491, 500-501, 158 Cal.Rptr. 126 (1979); *Community Redevelopment*

Agency v. Superior Court, 248 Cal.App.2d 164, 169, 56 Cal.Rptr. 201 (1967).

The procedural aspects of the Validation Act--including the 60-day limitations period--are reasonable and therefore do not violate Petitioners' constitutional rights.

In *Littlewolf v. Hodel*, 681 F.Supp. 929 (D.D.C. 1988), *aff'd*, 877 F.2d 1058 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1043, 110 S.Ct. 837, 107 L.Ed.2d 832 (1990), the court upheld statute of limitations in the White Earth Reservation and Land Settlement Act of 1985, Pub. L. 99-264 § 2, 100 Stat. 61. The court noted the deference which is to be given to legislators in this regard: "The reasonableness of the time period is primarily judgment for the legislature, 'unless the time allowed is manifestly so insufficient that the statute become a denial of justice.'" (681 F.Supp. at 939, *quoting Wilson v. Iseminger*, 185 U.S. 55, 63, 22 S.Ct. 573, 575-576, 46 L.Ed. 804 (1902). *See also A. Soloff & Son, Inc. v. Asher*, 594 F.Supp. 724 (S.D. N.Y. 1984) (held, 60-day statute of limitation under the Multiemployer Pension Plan Amendments Act [29 U.S.C. § 1381 *et seq.*] upheld against

constitutional challenge); *Emberton v. City of San Diego*, 186 Cal.App.3d 268, 230 Cal.Rptr. 572 (1986), *cert. denied*, 481 U.S. 1038, 107 S.C. 1975, 95 L.Ed.2d 815 (1987).

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CONCLUSION

For all the foregoing reasons, Respondents submit that Petitioners have failed to establish any sound basis for this Court to review the holding below. The petition for writ of certiorari should therefore by denied.

Respectfully Submitted,

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Dated: March 3, 1993